

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3440 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

JAYANTI VELABHAI KOLI

Versus

COMMISSIONER OF POLICE

Appearance:

MR RAJESH M AGRAWAL for Petitioner
MR HH PATEL, AGP, for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 07/12/1999

ORAL JUDGEMENT

1. The petitioner came to be detained by virtue of
an order passed on 13th March 1999 by Commissioner of
Police, Rajkot city, Rajkot in exercise of powers under
sub-section [1] of section 3 of the Gujarat Prevention of
Anti Social Activities Act, 1985 [hereinafter referred to
as 'the PASA Act', for short]. The detaining authority
in the grounds of detention observed that the petitioner
is involved in bootlegging activities and offence is

registered against him in this regard. The statements of two witnesses indicate that he is using force for pursuing his bootlegging activities which has ultimately resulted into disruption of public order. The authority observed that resorting to a less drastic remedy is not possible to immediately prevent the petitioner from continuing his activities and detention order under the PASA has, therefore, to be resorted to. The authority while considering the statements of two witnesses satisfied itself that the events stated by the witnesses and the fear expressed by the witnesses qua the petitioner are correct and genuine respectively and therefore, there is a need for exercise of powers u/s 9[2] of the PASA Act in public interest. The authority therefore passed the order.

2. The petitioner has approached this Court with this petition under Article 226 of the Constitution of India challenging the order of detention on various grounds. The main ground is that the statements of witnesses were recorded on 12th March 1999, the same were verified by the detaining authority on 13th March 1999 and the order of detention came to be passed on that very day i.e. on 13th March 1999. Therefore, there was no sufficient time lag available to the detaining authority to arrive at a subjective satisfaction and the order would therefore stand vitiated. Another ground that is raised is that the petitioner was in judicial custody when the order came to be passed and therefore, the order is based on irrelevant consideration. Lastly, it is submitted that the representation dated 31st March 1999 addressed to the detaining authority as well as the Chief Minister is not considered in time.

3. Ms. Kachhawa, learned advocate for the petitioner has restricted her arguments to the above grounds only. In support of her first contention regarding judicial custody, she placed reliance on the decision of the apex court in the case of Abdul Razak Abdul Wahab Shaikh v/s S.M. Sinha, Commissioner of Police, Ahmedabad as reported in AIR 1989 SC 2265. As regards the other point, she submitted that there was non-application of mind while exercising powers u/s 9[2] of the PASA Act. The authority had no time to genuinely verify the correctness and genuineness of the statements of the witnesses. In this regard, she has pressed into service the decision of this Court in the case of Kalidas Chandulal Kahar v/s State of Gujarat as reported in 1993[2] GLR 1659.

4. Mr.H.H.Patel, learned AGP has opposed this

petition. He submitted that, so far as the passing of order while petitioner was in judicial custody is concerned, a decision of the Division Bench of this High Court may be considered. He has placed reliance in the case of Osman Ali Khatki v/s Commissioner of Police, reported in 1994 [1] GLH 512 and submitted that this ground is not available to the petitioner. As regards the passing of the order on the very day on which the statements are verified, Mr. Patel in fairness concedes to the factual aspect, but submits that at times it becomes necessary for the detaining authority to pass the orders expeditiously and it may not be taken as non-application of mind. He therefore submitted that the petition may be dismissed.

5. Coming to the contention raised by the petitioner regarding petitioner being in judicial custody when the order came to be passed, it may be noted that the detaining authority was conscious about the fact of the petitioner being judicial custody. In para 7 of the grounds of detention, it is recorded that the petitioner is in judicial custody, but is likely to obtain bail and pursue his illegal activities which may put the public order of the city of Rajkot in danger. Now, referring the decision of the apex Court in the case of Abdul Razak Abdul Wahab Shaikh v/s S.M.Sinha, Commissioner of Police as reported in AIR 1989 SC 2265 relied upon by Ms. Kachhwah. It is true that in that case, the Supreme Court held that the order was bad because the petitioner was in custody and in absence of any bail application, the authority could not have hatched the apprehension of his release on bail. However, against this, if the decision of the Division Bench of this High Court is considered in the case of Osman Ali Khatki [supra], the decision is based on the decision of the apex Court in the case of Kamarunnisa v/s Union of India as reported in AIR 1991 SC 1640. If that decision is considered, Their Lordships of the Supreme Court took into consideration the number of earlier judgements of that Court on the point and then observed as under :-

"From the catena of decisions referred to above, it seems clear to us that even in the case of a person in custody, a detention order can validly be passed [1] if the authority passing the order is aware of the fact that he is actually in custody; [2] if he has reason to believe on the basis of reliable material placed before him [a] that there is a real possibility of his being released on bail, and [b] that on being so

released, he would in all probability indulge in prejudicial activity and [3] if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a Higher Court. What this court stated in the case of Ramesh Yadav [AIR 1986 SC 315] [supra] was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention."

6. The present case therefore would fall in the category of the case of Kamarunnisan [supra] before the apex Court. Here the petitioner is involved in prohibition cases and bootlegging activities and therefore, the apprehension expressed by the detaining authority cannot be said to be not well founded. The first contention therefore raised by Ms. Kachhawah deserves to be turned down.

7. Now, coming to the second contention, it is clear that the statements of witnesses were recorded on 12th March 1999. The same were verified on 13th March 1999 and the order of detention came to be passed on that very day. The detaining authority has based the subjective satisfaction for exercise of powers u/s 9[2] of the PASA Act and the statements of the witnesses verified by it. It may be noted that the detaining authority must have some material to arrive at a subjective satisfaction about the genuineness of the fear expressed by the witnesses. A balance is required to be struck by the authority while exercising powers u/s 9[2] of the PASA Act between the right of the detenuo of making an effective representation and the public interest and for considering either of the two, there has to be some material before the detaining authority which can be considered by the detaining authority. Study of this material would require time, which would be necessary to be done for proper exercise of power u/s 9[2] of the PASA Act. In the instant case, no time is taken by detaining authority and order is passed on the same dayy of

verification of statements. No affidavit in reply is filed by the detaining authority. The Court is therefore at loss to appreciate how the detaining authority examined the necessity of exercising the powers u/s 9[2] of the PASA Act and recorded a subjective satisfaction that the genuineness of the fear expressed by the witnesses qua the petitioner, so also the correctness of the statements qua the incidents narrated therein. That being so, the exercise of powers u/s 9[2] of the PASA Act stands vitiated and has resulted into depriving the petitioner of making an effective representation guaranteed under the Constitution of India. The order of detention therefore would stand vitiated on account of improper exercise of powers u/s 9[2] of the PASA Act by the detaining authority.

8. The petition is therefore allowed. The impugned order of detention passed by the Commissioner of Police, Rajkot city, Rajkot, on 13th of March, 1999 in respect of the petitioner Jayanti Velabhai Koli, is hereby set aside. The petitioner be set at liberty forthwith, if not required, in any other case. Rule is made absolute accordingly with no orders as to costs.

[A.L.DAVE, J.]

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